absence of any act on her part to encourage him in his negligence. *Louisville, etc., Ry. Co.* v. *Creek,* 130 Ind. 139, 29 N. E. 481; *Chicago, etc., Ry. Co.* v. *Spilker,* 134 Ind. 380, 33 N. E. 280. However, where a traveler riding with another, having an equal opportunity to discover and avoid danger, is injured through the negligence of the driver and another he is himself guilty of such negligence as precludes a recovery. *City of Vincennes* v. *Thuis,* 28 Ind. App. 523, 63 N. E. 315; *Bush v. Union Pac. Ry. Co.,* 62 Kan. 709, 64 Pac. 624.

In the principal case it is clear that the plaintiff had no control over the driver, and that she had not an equal chance to avoid the danger. She should have been allowed to recover for her injuries—the court seems to have erred when it held that the negligence of the driver is imputed to her.

PARENT AND CHILD—CUSTODY OF CHILD—TRANSFER.—The father and mother were husband and wife. There was an agreement between the mother and her aunt whereby the aunt should on the mother's death take the child in question into her custody and rear it. The father was not a party to this agreement. At the time of the mother's death, the aunt took possession of the child. It is admitted that both the father and the aunt were proper persons to have custody of the infant. *Held,* father can regain possession of his child. *Zink* v. *Milner* (Okla.), 135 Pac. 1.

No contract for the disposition of a child can be made by the father during his life time, the mother not participating therein, that will prevent the mother from recovering the custody of her child after the death of the father. *Moore* v. *Christian,* 56 Miss. 408, 31 Am. Rep. 375; *State* v. *Reuff,* 29 W. Va. 751, 2 S. E. 801, 6 Am. St. Rep. 676. Neither the mother nor the father can make a valid disposition of their children by will as against the surviving parent. *People* v. *Boice,* 39 Barb. (N. Y.) 307; *Hernandez* v. *Thomas,* 50 Fla. 522, 39 So. 641, 2 L. R. A. (N. S.) 203. The father can regain custody of a child given into the keeping of third parties in pursuance of a contract made by the mother on her death-bed and to which the father assented. *Hibbett* v. *Bains,* 78 Miss. 695, 29 So. 80, 51 L. R. A. 839; *Bailey* v. *Gaston* (Ala.), 62 So. 1017. Even when the mother has been awarded the child by a decree of divorce, she cannot deprive the father of its custody after her death. *In re Neff,* 20 Wash. 652, 56 Pac. 383.

PRINCIPAL AND SURETY—EFFECT OF UNAUTHORIZED PAYMENTS TO THE PRINCIPAL.—The plaintiffs were owners of a building in course of construction and held the defendant's bond of indemnity against loss in case of default by the building contractor. The building contract specified that in addition to monthly payments a final percentage should be retained until the completion of the building. The bond stated that unless the final payment were made with their consent no liability should attach to the surety. The plaintiffs made a premature payment and later the contractor defaulted. The action was brought to hold the sureties on their bond. *Held,* the failure to hold the final percentage

releases the sureties. *Young Men's Christian Association* v. *United States etc., Co.* (Kan.), 133 Pac. 894.

The great majority of cases hold that contracts of a surety company which make suretyship a matter of profit shall be treated as insurance contracts, to be construed, in case of ambiguity, in favor of the insured. *U. S. Fidelity and Guar. Co.* v. *Golden, etc., Co.,* 191 U. S. 416. And it has further been held that a surety on a contractor's bond is an insurer and that a breach by the creditor releases the surety only *pro tanto. Hormel* v. *America Bonding Co.,* 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513. But under the facts in the principal case a stricter rule should apply. The reservation of part of the contract price is for the benefit of the bonding company as well as the creditor. *Prairie State Bank* v. *U. S.,* 164 U. S. 227; *Finney* v. *Condon,* 86 Ill. 78. In the case of unauthorized premature payments, such as occurred in the principal case, the contract of surety should be strictly construed; and the weight of authority is to the effect that the surety is completely discharged. *Taylor* v. *Jeter,* 23 Mo. 244; *Cowdery* v. *Hahn,* 105 Wis. 455, 81 N. W. 882, 76 Am. St. Rep. 923. The rule completely relieving the sureties in the case of premature payments seems to be the sounder in principle. Such payment of the reserved fund deprives the bonding company of the inducement which the principal had to complete the work in compliance with the terms of the contract. *Backus* v. *Archer,* 109 Mich. 666, 67 N. W. 913; *Calvert* v. *London Dock Co.,* 2 Keen 639. When two parties have reduced their wishes to a contract they have the right to enforce a strict observance of the same. *Bank* v. *Fidelity and Dep. Co.,* 14 Ala. 335, 40 So. 415, 5 L. R. A. (N. S.) 418 (note).

UNFAIR COMPETITION—MEASURE OF DAMAGES.—In a successful suit on the ground of unfair competition, it was *Held,* in addition to an injunction, the appellant is entitled to compensatory damages for injury to his business in the past, which are not, as in the case of trademarks, measured by the profits made by the appellee but are to be based upon the actual injury to his business. *Wolf Bros. & Co.* v. *Hamilton-Brown Shoe Co.,* 206 Fed. 611.

As to the measure of damages in cases of infringement of rights under trademarks there is some variance of opinion. All the courts are agreed that, in addition to an injunction, the plaintiff is entitled to damages equal in amount at least to profits lost by reason of such infringement, which may best be shown by the defendant's sales of the infringing article. *Societe Anonyme* v. *West Dist. Co.,* 46 Fed. 921; *Hostetter* v. *Vowinkle,* 1 Dill. 329, 12 Fed. Cases 546; *Merriam Co.* v. *Saalfield,* 198 Fed. 369, 117 C. C. A. 245. Some cases go further and hold that besides an injunction the plaintiff is entitled not only to profits lost (which are generally held to be the profits realized by the defendant) but also to damages for injury done to his business by the sale of the spurious goods under his trademark. *Benkert* v. *Feder,* 34 Fed. 534; *Hennessy* v *Wilmerding-Loewe Co.,* 103 Fed. 90.

The allowance of damages for unfair competition is of comparatively modern origin, and naturally there is some diversity in the decisions on